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The Virginia Court did not indicate why legal and permanent "ineligibility" for parole is relevant to the issue of future dangerousness, even though "the fact that Roach would be eligible for parole in 25 years," and therefore will be for that period of time under 24-hour armed guard is not.[18] Nor did it explain why "the effect incarceration might have on Roach" was deemed to be a subject of "improper speculation," while speculation about future dangerousness in the abstract, counterfactually divorced from awareness of the alternative to death, apparently is "proper."

The very reasoning at the heart of this conclusion reached by the Supreme Court of Virginia compels a finding that the Constitutional right to due process is violated when future dangerousness is made a decisive issue, and yet the jury is not permitted information about the defendant's life if he is not executed. The situation is exacerbated where, as here, a juror asks a question concerning eligibility for parole and no answer is provided. Rather than eliminating "improper speculation," the Court's refusal to answer the question in fact made such speculation inevitable.

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[18] Actually, the Court did not say that parole ineligibility is not "relevant"; it said it was not "probative." It is hard to understand what this means, given that the burden of proof on the issue of future dangerousness is the Commonwealth's. Surely no one would contend that Steve – or anyone else – can "prove" that he would not be a continuing danger to society. The Supreme Court has never required proof, but merely reasoned prediction, regarding future dangerousness. *Jurek v. Texas*, 428 U.S. 262 (1976).

What Petitioner seeks here is not a "new rule" as that term is used in *Teague v. Lane*, 489 U.S. 288, 301 (1988) and its progeny. *Simmons* was decided before Petitioner's conviction became final. Roach seeks only an interpretation of *Simmons* consistent with its logic and true to its premises: one that, while it has never been expressly endorsed by a majority of the Justices of the Supreme Court, has surely never been rejected by them either.

* * *

INSTRUCTION No. AA

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant will be sentenced to (1) imprisonment for life or (2) imprisonment for life and a fine of a specific amount, but not more than $100,000.00 or (3) death by execution. However, before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt the following aggravating circumstance:

> That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society.

If the Commonwealth has failed to prove that circumstance beyond a reasonable doubt, then you shall fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00.

If you find from the evidence that the Commonwealth has proved that circumstance beyond a reasonable doubt, then you may fix the punishment of the defendant at:

(1) Imprisonment for life; or

(2) Imprisonment for life and a fine of a specific amount, but not more than $100,000.00; or

(3) Death by execution.

Any decision you make regarding punishment must be unanimous.